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AMERICAN BAR ASSOCIATION

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August 16, 1999

Ms. Debra A. Valentine, General Counsel
Federal Trade Commission
Sixth Street and Pennsylvania Ave., NW
Washington, DC 20580

Dear Ms. Valentine:

On behalf of the Section of Labor and Employment Law of the American Bar Association (the "Section"), I am writing to voice the concerns of the Section regarding an Opinion Letter dated April 5, 1999 which is attached hereto, on the breadth of certain consumer protection provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* This letter has caused considerable consternation among members of the Section. The views expressed herein are being presented on behalf of the Section of Labor and Employment Law. They have not been approved by the House of Delegates nor the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

This Section has over 21,000 members and is the fifth largest and one of the fastest growing sections in the American Bar Association. The Section consists of attorneys in private practice, government, and corporations. Its members represent employers, unions, and plaintiffs in employment and labor matters or serve as public servants or neutrals (mediators and arbitrators) in these areas of the law. The Section's governing council and substantive committees include representatives of all the constituencies in order to ensure the presentation of a balanced point of view on matters of public policy.

With respect to the Opinion Letter, the Commission appears to have taken the position that certain notice provisions and others designed to protect consumers from flawed or erroneous credit investigations apply with equal force to other investigations wholly unrelated to "credit worthiness, credit standing, credit capacity" or otherwise affecting the "general reputation of consumers." 15 U.S.C. § 1681(a)(2). Specifically, the Opinion Letter stated it was the position of the Commission that investigations of possible employee misconduct – of any nature – including theft, fraud, violence, or harassment, were covered by the FCRA.

The Section does not know the extent to which the Opinion Letter represents the position of the FTC or of its General Counsel's office, nor will it speculate as to the degree of deference the Opinion Letter seeks or deserves from the courts. However, the Section requests that the Commission revoke, re-examine, and recast the Opinion Letter which it believes is not

well-grounded in the statute. Even if an arguable statutory basis for extending the FCRA to investigations of employee misconduct exists, the Opinion Letter is improperly expansive and, as a result, derogates other legal doctrines and policies of equal importance to employees and employers.

Before examining the particulars of the Opinion Letter in detail, the statutory basis for the Opinion Letter should be addressed as that provides the broadest and most complete avenue of revoking and re-examining it.

Congress set forth the purpose of the FCRA in its Findings, all of which address "confidentiality, accuracy, relevancy, and proper utilization" of information regarding "credit worthiness, credit standing, credit capacity, character, and the general reputation of consumers." 15 U.S.C. §§ 1681(b); 1681(a)(2). The initial and pre-eminent finding demonstrates that Congress' purpose was not to regulate the relationship between employees and employers, but to assure, by means of fair and accurate credit reports, "public confidence . . . essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

It has been fashionable in the past to discount such Congressional Findings as a form of legislative "filler." However, the United States Supreme Court, in a series of recent rulings involving the Americans With Disabilities Act ("ADA"), based the most significant part of those rulings on the Findings provisions of the ADA.

Thus, we ignore the Findings at our peril.

Beyond the Findings, there are other portions of the FCRA that illustrate that Congress did not intend to fundamentally alter the manner in which employee misconduct can be investigated. For example, nowhere in the FCRA are the terms "employee" or "employer" either defined or used. While "employment" is prominently featured in the FCRA, it is routinely presented as an object worthy of protection from unfair or erroneous credit reporting. 15 U.S.C. §§ 1681a(d)(1)(B); 1681a(h).

In an Act otherwise so comprehensive, specific, and proscriptive, the omission of all reference to employees and employers, other than as consumers taking action regarding credit or as consumers being affected by actions regarding credit, is particularly significant. This is all the more true in light of the profound way in which the FCRA, as interpreted by the Opinion Letter, would regulate the employment relationship. Such wholesale regulation cannot have been either inadvertent or incidental, yet that is precisely what the Opinion Letter offers.

As a threshold issue, there is no statutory basis for extending the reach of the FCRA to include investigations of employee misconduct unrelated to issues concerning "credit worthiness, credit standing, [or] credit capacity."

In the event the Commission disagrees then it must confront the obligations and procedures imposed by other laws, rules and public policies which are in conflict. The Opinion Letter does not do so.

The Opinion Letter is particularly disruptive with respect to sexual harassment investigations. It requires that the object of the investigation must consent to the investigation, may be entitled to notice of the results before any adverse employment action is taken against him or her, and is entitled to a copy of the

report, if any, and any documents related to the investigation.[1]

The Section's comments on FCRA are not intended to imply support for nondisclosure by investigators of allegations and their source to the person accused. The Section favors in careful, good faith investigations that provide the accused an opportunity to know about and respond to the charges. However, the way in which that is done is a far cry from the rigid requirements of the FCRA, and that is our concern. In fact, the forced consent provision and the prospect of forced disclosure will have negative repercussions not just for the employer, but for all those involved in investigations of sexual or other forms of harassment. Employees who had complained would find that their comments would have to be given to the alleged harasser, which would seriously chill the willingness to report problems or to take part in investigations, and would greatly increase the likelihood of retaliation and threats of suit against them for defamation and other torts. This is a use of the information utterly contrary to that contemplated by the statute: "fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.. . . ." 15 U.S.C. § 1681(b).

Further, if an alleged harasser refused to permit the investigation to go forward, the employer would have no choice but to take steps that would take the alleged victim or victims out of the work environment of the alleged harasser, which might itself give rise to claims of retaliation or additional sexual discrimination.

Finally, the risk that objects of work place investigations might sue under the FCRA (which provides for out-of-pocket losses, attorneys' fees, and punitive damages) will inevitably lead employers to refuse to retain outside assistance in conducting sexual harassment investigations. That omission, in turn, will seriously affect employers' abilities to implement their non-harassment policies and will chill the implementation of the Supreme Court's decisions in the *Ellerth* and *Faragher* cases of 1998. Indeed, especially when high-level employees are those accused of harassment, it is critical for employers to be able to call on outside resources to conduct the investigation.

Not incidentally, these burdens and impediments apply as well to the counsel retained by the alleged victims of harassment. Plaintiffs' counsel either investigate or employ investigators to scrutinize the prior conduct of the alleged harasser. These investigations would also fall under the Opinion Letter's over-inclusive definitions. Thus, an alleged victim would not be permitted to investigate the alleged harasser without first obtaining his consent. Congress clearly did not intend *sub silentio* to further victimize the victims of sexual harassment when it provided protections for consumers from erroneous credit reports.

The Opinion Letter's position also reaches far beyond harassment, either sexual or racial. The interpretation would stymie investigations of alleged theft, embezzlement, expense report fraud, disclosure of trade secrets, and other types of employee misconduct and render them useless if the employer had first to secure the consent of the target of the investigation. Moreover, the need to disclose documents relating to the investigation could itself significantly reduce the likelihood of securing other necessary evidence.

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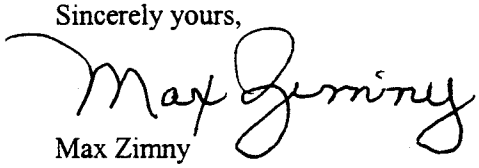
[1] The Section is aware that pursuant to 15 U.S.C. § 1681g(a)(2), sources of information need not be disclosed. However, the Opinion Letter stated that there can be no selective redacting of either consumer reports or investigative consumer reports. Thus, investigators are left with the "Hobson's choice" of disclosing no names of sources or all the names. Either "choice" would render a harassment investigation useless, the first by trampling on the due process rights of the accused and by preventing the investigation from gaining direct, exculpatory evidence, the second, by chilling everyone's participation in the investigation.

These complications, and, in all likelihood, these unintended consequences of the FCRA, could be readily corrected by a re-interpretation by the Commission stating that investigations that are probing incidents of alleged misconduct not relating to credit are not included in the definition of a "consumer report" or an "investigative consumer report."[2]

The Section strongly urges a re-examination of the Opinion Letter and are available to confer with you or otherwise provide input to your office. Thank you for your consideration.

Sincerely yours,



Max Zimny
Chair, Section of Labor and Employment Law

[2]The Section understands that the Commission itself may realize investigations done only after an individual has filed a charge of discrimination or litigation against the employer or accused harasser would not fall within the statutory ambit even under the rationale of the Opinion Letter because they are done for the purpose of legal defense rather than in order to provide a basis for employment decisions. Nevertheless, such awareness does not ameliorate the fundamental concerns created by the Opinion Letter.